No. 11235.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the estate of Genevieve Borlini Hill,

Appellants,

vs.

PETER S. HILL, JOANNE HILL, also known as Joan A. Hill, PATRICIA HILL HARDER and THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

As an introduction to appellees' brief we adopt the memorandum entitled Conclusions of the Court written by Judge Paul J. McCormick in arriving at the decision from which this appeal was taken. This memorandum is set out in full in the transcript of record [R. 16 to 22]. The part which we adopt in this brief is as follows:

> "The question for decision is whether the proceeds of the policy should go to the widow's estate or to the contingent beneficiaries, namely, the children of the insured by a former marriage.
>
> "The contract of insurance under consideration was negotiated for and delivered in the State of Cali-

fornia. Under such facts the policy must be interpreted and the rights of the claimants to the benefits due or to become due under the terms of the policy will be governed by the law of the State of California.

Mutual Life Co. v. Johnson, 293 U. S. 335;

Ruhlin v. New York Life Ins Co., 304 U. S. 202;

Rosenthal v. New York Life Ins. Co., 304 U. S. 263.

"The terms and provisions of the policy in suit constitute the measuring rod or denominator by which the court is to determine the rightful claimant to the amount now on deposit in the registry. See Section 10111, Insurance Code of the State of California.

"The court must ascertain the intention of the insured gleaned from all parts of the policy read as a whole and reasonably and normally considered any material alteration of the writing. If then the policy is clear in expressing the intention of the insured as to whom and in what manner persons designated by him shall succeed to the benefits of the policy, the court is bound to effectuate the insured's expressed purpose by deciding the case accordingly.

Northwestern Mutual Life Insurance Co. v. Fink (C. C. A. 6, 1941), 118 F. (2d) 761.

"Preliminary to examining the policy the undisputed facts of the case should be stated. They are as follows: Under date of December 2, 1924, the Northwestern Mutual Life Insurance Company duly issued its policy for $10,000.00 on the life of George A. Hill, Jr. The policy gave the insured the right to change beneficiaries and also provided for the

right of the insured to designate both direct and contingent beneficiaries at his option and choice. The policy when issued to Mr. Hill contained the designation of 'his children Peter B., Joanne and Patricia Hill the direct beneficiaries, share and share alike, the survivors or survivor.' There was no other beneficiary named in the policy at the initial issuance of it. Subsequently, under date of January 26, 1944, Mr. Hill changed the direct beneficiary from his children to 'Genevieve B. Hill, wife,' and under the same date designated as contingent beneficiaries 'Peter B. Hill, Joanne Hill and Patricia Hill Harder, children, share and share alike, the survivors or survivor.' Hill the insured, died on November 24, 1944. Due proof of his death was submitted to and received by the plaintiff insurance company. Thereafter, on January 2, 1945, the widow, Genevieve B. Hill, direct beneficiary, died without having made any election under paragraph 1a of the 'special provisions' set out in the policy. This paragraph which follows another, whereby the insured is given the right before the policy becomes payable to elect payment of the then net proceeds under options specified in the policy read:

"Privileges of Direct Beneficiary.

1a. If when this policy becomes payable no such election by the Insured is then in force, the Direct Beneficiary or Beneficiaries may make such election in lieu of payment in one sum and upon such an election by the Direct Beneficiary or Beneficiaries the interest of any Contingent Beneficiary designated by the Insured shall terminate. The Direct Beneficary or Beneficaries may then, subject to change, designate a Contingent Beneficiary or Beneficiaries under the election so made.

"The executors of Mrs. Hill's estate earnestly argue that parts of the policy, including paragraph 1a, which are specified under the caption 'Special provisions relating to settlement when this policy becomes payable,' have no application to the situation presented in this case. We cannot agree with such contention.

"It is obvious that the policy matures and therefore 'becomes payable' upon the death of the insured. However, the payments are to be made to such beneficiaries and in such manner as to carry out the intention of the insured as expressed in the policy under consideration. Paragraph 1a provides ways by which 'the interest of any contingent beneficiary designated by the insured shall terminate.' These quoted words connote an interest of the contingent beneficiaries, i. e,, the children of the insured after the death of the insured under the situation which the undisputed evidence in this action discloses.

"But the interest of the 'Hill children' in the benefits of the policy due or to become due upon the death of the insured is not to be determined solely from the 'Special provisions relating to settlement when this policy becomes payable.'

"To more certainly evaluate the meaning of the policy in suit as it pertains to those named therein as beneficiaries, consideration should be given to the insured's natural propensity to financially provide for and protect his widow during her lifetime, and, next his own children, rather than her relations or creditors. He unmistakably manifested this attitude by primarily naming his children as sole beneficiaries of the policy, and upon realizing later conjugal obligations, substituting his wife as direct beneficiary but still regardful of his children's welfare also, he simultaneously named them contingent beneficiaries.

"But we are not left to inferences from the policy in concluding that the intention of the insured was to confine all unpaid benefits of the insurance contract to his wife firstly, and to his children if it became impossible because of her death for her to receive any such benefits. The clearly expressed terms of the policy warrant no other conclusion.

"Paragraph 11 of the 'General Provisions' of the policy is a lengthy statement which relates to and deals with several distinct features of the contract of insurance in controversy and is for convenient reference in the memorandum filed by the executors of the estate of Genevieve B. Hill restated as Sentences (A), (B), (C), (D) and (E). The executors contend that the entire paragraph 11 must be deemed to refer to a period ending with the insured's death —not to a period after the insured's death. We think such contention untenable upon analysis of the several subject matters contained in Paragraph 11. We are also of the opinion that all the sentences in Paragraph 11 have no necessary contextual meaning.

"Sentence (E) has no application to the situation before us in this action and may be left out of consideration as immaterial. Sentence (A) is material here only in that it provides in '(2)' that the interest of contingent beneficiaries shall be as expressed in the policy. Sentences (B), (C) and (D) all relate to payments of benefits, but each of such sentences deals with specific and separate actualities. (B) is immaterial to this controversy as there is only one direct beneficiary in the policy in suit. Likewise (D) is of no effect in this action, but Sentence (C) is not only applicable to the situation before us, but clearly and conclusively determines the right of the 'Hill Children' to the unpaid benefits of the policy now in the registry of the court.

"So-called Sentence (C) of the policy in suit is as follows:

> '(C) Upon the death of the last surviving Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due.'

"It is clear that this requirement reads directly and unequivocally upon the admitted and established situation before us in this action. Mrs. Hill was the last surviving direct beneficiary, and not having received during her lifetime the unpaid benefits due under the policy, the contingent beneficiaries, to-wit, the three 'Hill Children' succeed to the unpaid benefits of the policy, which is the money remaining in the registry in this action.

"There is nothing in any part of the policy in suit which can militate against our conclusion as to the decisive effect of Sentence (C) upon the situation before us in this action. On the contrary, the provisions of Paragraph 5 of the 'Special Provisions Relating to Settlement when this Policy becomes Payable' are substantially identical with Sentence (C) of Paragraph 11 of the 'General Provisions' of the policy and strengthen the accuracy of our conclusions in this case.

"We think that under the terms and provisions of the policy in suit and in the light of the admitted facts and circumstances in proof in this action, the contingent beneficiaries and not the testamentary representatives of the deceased person who in her lifetime was the direct beneficiary in the contract of insurance are entitled to share and share alike to an award of the money deposited by the plaintiff insurance company in satisfaction of Policy No. 3204489

of the Northwestern Mutual Life Insurance Company.

"The rights of the direct beneficiary upon the death of the insured are not to be ascertained or determined by fixed abstract rules which are not applicable to the factual situation before the court in the consideration of the specific contractual obligation in controversy, and for that reason many of the authorities cited in the memorandum of the executors have no application in the case at bar."

At the risk of appearing as an anti-climax to Judge McCormick's statement of the facts and law we desire to add certain comments on the points raised in the appeal.

Intention of the Insured to Govern.

The solution of this contest will be the determination through legal channels of the intention of Mr. Hill, the insured, and the judgment of the court will determine whether his intention is that the proceeds go to the children of the insured or through the estate of the wife to her creditors, heirs, or legatees.

The ideal procedure for determining the intention of Mr. Hill would be to ask him. Obviously this is impossible but the problem can, in our opinion, be clarified by asking the question, if it were possible, as follows:

"Mr. Hill, you have earned and paid for an insurance policy, the proceeds of which amount to $10,060.10, and are now in the registry of this court. Your wife, Genevieve B. Hill, has passed on and has no further need of the money. During her lifetime after your decease you gave her the power to terminate any interest of your children in the proceeds of the policy and to designate anyone whom she might choose, whether known or unknown to you, to take

> the proceeds if she did not receive them personally. This she did not elect to do but left the proceeds of the policy to be paid in the manner provided by you in the policy. Do you now intend that the proceeds be paid to your children or to parties either known or unknown to you through your wife's estate?"

In searching for the intention of Mr. Hill, the insured, the court will of course, look to the policy of insurance, all parts of which should be read together, due consideration given to every part, every part interpreted to give it a reasonable meaning in the setting of surrounding circumstances, and all the other rules of interpretation followed with which the court is adequately familiar. We can only add that the instrument should be construed liberally, and should be given the broad interpretation followed in instruments of testamentary character, and, if any doubt exists as to intention, that interpretation followed which would favor the natural inclination of the insured to provide for his own children before strangers.

> *Chartrand v. Brace* (1891), 16 Colo. 19, 26 Pac. 152, and *infra.*

Before considering the specific arguments in the appellants' brief may we point out that under no argument could there be a question regarding the disposition of proceeds if the insured during his lifetime had made an election under one of the four options available in the policy. (Special Provisions 1 [R. 45, 46].) The language is so clear that "he who runs can read," and see that the Direct Beneficiary would take such benefits under these options as would have been paid to her during her lifetime and that thereafter the remaining benefits would be paid to the children. (Special Provisions 5 [R. 46, 47].) This plan of distribution was adopted by Mr. Hill in the event

he should select one of these option plans, and there is no language in the policy which would even suggest an entirely different plan of distribution if he chose to have the cash paid in one lump sum. We can see no logic whatever to argue that the remaining benefits after the death of the wife, if payable in installments, would go to Mr. Hill's children, whereas the remaining benefits, if paid in one installment, would go to strangers taking through the wife's estate. Therefore, the whole policy should be construed under this basic plan and the benefits unpaid upon death of the wife paid to the three children.

Answer to Point (1) of Appellants' Brief.

We now intend to answer specifically some of the points and statements made in appellants' opening brief.

Starting at the top of page 6 under paragraph (1) the statement is made, "The policy obligated the insurance company to pay immediately upon the death of the insured." This is not true. As indicated by the policy itself [R. 39] and as admitted by appellants later on page 6, the promise is to pay the proceeds "immediately upon receipt of due proof of the death of the insured." The Special Provisions [R. 45] do not change this obligation of the company but permits the insured or the direct beneficiary to elect various schedules for receiving the money from the insurance company.

It is true that in order to make such payment there not only had to be someone ascertainable at that time, i.e., the time of payment, but there had to actually be some beneficiary designated by the policy to receive such payment. If the direct beneficiary was not living at the time of payment the contingent beneficiaries named in the policy succeeded to the interest of the direct beneficiary including

any unpaid benefits due or to become due. [See paragraph 11 of the policy, R. 43.]

If the interpretation of the appellants were followed literally the policy contract would be impossible of performance by immediate payment if the direct beneficiary were deceased when the proof of death was received because steps would have to be taken to ascertain by court procedure the personal representative, heirs, or legatees of the direct beneficiary before payment could be made. The argument of appellants that someone must be "immediately identified" upon receipt of proof of death will disclose its fallacy as we consider the situation if the direct beneficiary should die after the insured but *before* receipt of proof of the insured's death by the company. Under appellants' interpretation of the policy no one could be identified to receive the benefits of the policy because the direct beneficiary would be deceased and no on else identified to receive the benefits.

This problem of identifying the person to receive benefits of the policy at time of payment is not difficult for the company if one of the settlement options is elected by the insured. The appellants will probably admit that the direct beneficiary would have been entitled to receive only such payments as would be made to her during her lifetime and that upon her decease the balance would be paid to the contingent beneficiaries. [See policy General Provisions, paragraph 11, R. 43, and Special Provisions, paragraph 5, R. 46.] In such an event any check forwarding installments must be endorsed by the direct beneficiary in person. If the direct beneficiary is not living to

endorse the check it must be cancelled and a new check written out to the contingent beneficiary who, under the policy, succeeds to the interest of the direct beneficiary upon her decease including all benefits due or to become due.

Is there any logical distinction to be drawn between a payment of proceeds to be made in one lump sum if option settlements are not elected and payments to be made in one installment or in many, if payments are to be made under option settlements? Since the provisions, even as admitted by the appellants are the same in both the General Provisions, paragraph 11, and Special Provisions, paragraph 5, of the policy [R. 43 and R. 46], is is not logical that one consistent plan and program is intended for the payment of all benefits and proceeds of the policy rather than one program for a single payment of the proceeds and a different program for the payment in installments?

We take exception to appellants' statement at the bottom of page 6 regarding surrounding circumstances. There are certain surrounding circumstances which will be referred to later in this brief.

The appellants are begging the question when they state on the top of page 7 that the contract shows a clear and definite intent that the proceeds of the policy shall be paid immediately upon due proof of death to the insured's widow. That is the question around which we have this law suit. The conclusion of the appellees is that the language of the policy expresses the intent, which is: that upon the decease of the direct beneficiary (the wife) the children of the insured succeed to all benefits due or to become due. The only right which the direct beneficiary has is to personally receive the proceeds paid to her while

she is living. There is no intent or right under the policy to have the unpaid benefits paid to the creditors, heirs or legatees of the wife. There is no allegation in this case that the insurance company fraudulently delayed payment of the claim. The simple fact is that the wife did not survive long enough to personally receive the proceeds of the policy, in which event the insured directed that the proceeds should go to his own children.

The whole argument in Point (1) overlooks the provision of the policy and the intent of the insured that the beneficiaries to take the proceeds were very definite and easily ascertainable, namely, the widow if she were living at the time of payment and if not the named children of the insured.

Answer to Point (2) of Appellants' Brief.

Point 2 on page 9 of appellants' brief discusses the rule of vesting in the beneficiary or beneficiaries upon the death of the insured. We take no exception to this statement of law and agree that it does so vest. This rule of law, however, and all of the cases cited in appellants' brief under this point relate to the rule of vesting when the contest is between a beneficiary and a purported assignee or the personal representative of the insured. Not one of the cases relates to the respective rights between the direct and contingent beneficiaries. It should be pointed out that a contingent beneficiary is also a beneficiary under this rule. The vesting rule settles the rights of both the direct and contingent beneficiaries as against the estate of the insured or any purported assignee of the policy of claimants under an uncompleted assignment or change of beneficiary. Upon the death of the insured the rights of both the wife (the direct beneficiary) and the children (the

contingent beneficiaries) became vested or fixed. These rights were that the wife should take the payments made to her during her life and that upon her decease the children should succeed to the balance of the benefits due or to become due.

This is the only statement of the rule of vesting which will explain the legal situation existing under this policy if the insured elects to have payments made under the option settlement installment plan. Obviously the appellants should not then try to apply this rule so as to give the wife (the direct beneficiary) all of the proceeds of the policy, including installments after her decease, under the argument that upon the death of the insured the rights of the direct beneficiary became "vested" in her alone and, therefore, upon her death these "vested" rights pass on to her estate so that the contingent beneficiaries would lose all benefits. The argument of vesting is just as erroneously applied in an attempt to deprive the children of their rights under the policy when there is no election of the option settlement.

Answer to Point (3) of Appellants' Brief.

A. General Provisions.

Section (3) of appellant's brief on page 13 discusses the essential point in this law suit, namely, the interpretation of the sentence designated in the brief as (C) of paragraph 11 of the General Provisions of the policy [R. 43 and R. 44]. Appellants seek to interpret this paragraph by having the court change the wording, inserting the words "prior to the death of the insured" to make sentence C read as follows, "C. Upon the death of the last surviving direct beneficiary (prior to the death of the insured) the contingent beneficiary or beneficiaries, if any, shall

succeed to the interest of such direct beneficiaries including any unpaid benefits due or to become due." If the court had the power to do so and desired to change the meaning of this sentence by such an insertion the contention of the appellants would have some support. If this were done, however, it would make a very poorly drafted document. As appellants state on page 15, at the bottom of the page, all of paragraph 11 should be construed as a whole as it is intended to cover an "entire series" of possible contingencies. However, using the interpretation of the appellants, paragraphs B and C would be limited in their application to contingencies prior to the death of insured only and would leave the whole matter of contingencies after the death of the insured without any coverage by the policy. It hardly seems likely that a document as carefully drawn as a life insurance policy by the Northwestern Mutual Life Insurance Company would show such gross carelessness. Certainly a strained argument attempting to read into the sentence what it does not contain should not be indulged in by the court to bring about such a glaring instance of poor draftsmanship.

On the other hand, if the sentence is construed to mean exactly what it says it will provide for the disposition of any unpaid benefits due or to become due upon the death of the last surviving direct beneficiary. This obviously is not limited by the wording to any special period either before or after the death of the insured but is general and refers to the death of the surviving direct beneficiary whenever it occurs. It is obviously the intention of the

insured, in accepting this policy, that it would be interpreted in accordance with the plain meaning of its language. We submit that it is very doubtful that the insured or anyone with less than a special skill in law could follow out the arguments of interpretation as set forth in section (3) of the appellants' brief. Since it is the intent of the insured which the court is attempting to discover the court should take the plain, ordinary and obvious meaning of the sentence as it would be understood by an ordinary layman and refrain from adopting circuitous reasoning to give it a meaning not included on its face. It is plain from reading at the bottom of page 17 of the appellants' brief that the attempt is made to insert in this sentence the words "prior to the death of the insured," which words are put in italics in the brief. For authority that the court cannot and will not change the plain language of the policy by inserting words not already in it to change its meaning we have only to refer to an almost identical situation in the case of *Northwestern Mutual Life Insurance Company v. Fink,* 118 F. (2d) 761 (C. C. A. 6, 1943), which will be more specifically referred to later in this brief.

On page 15 of the brief, appellants make the following statement: "Taken separately and divorced from their context, sentences (B) and (C) are not clear. So taken they may refer either to a period before the insured's death, or to a period both before and after the insured's death." This, we submit, is a very fair and proper statement of the real meaning of sentence (C). As stated by appellants the language may refer to a period *before* the insured's death or to a period both *before and after* the insured's death. It will be noticed that this analysis makes the second interpretation include the first. In other words, the interpretation of both "before and after" includes the

interpretation of "before". Therefore, the issue does not involve opposed interpretations but is merely a question of whether the plain and simple statement of the sentence is to be narrowed, restricted and cut down to a partial application of its full meaning. Since the wording in sentence (C) "upon the death of the last surviving direct beneficiary" would naturally refer to the time of the death of the last surviving direct beneficiary what reason can there be for changing this meaning and limiting it to the death of the direct beneficiary within a certain prescribed time limit. Certainly this should not be done unless there is some wording in the policy which indicates an intention to do this. There is nothing in appellants' brief which indicates that any wording of the policy suggests such a narrow meaning. The only argument is that because it is in proximity to other sentences which are by their own specific wording limited to a narrow period of time, automatically sentence (C) becomes also narrowed. If there are several marbles adjacent to each other and one of them is black we would hardly be justified in concluding the other adjoining marbles are black because they happen to be adjacent or contextual. Is it not a more logical method to look at the marbles and see that some are black and others white?

Apart from the fallacy of this contextual argument there is no more justification for limiting the meaning of sentence (C), which clearly includes both *before and after* the insured's death to refer only to a period before death than there would be in interpreting the word "cow" used in a sentence to mean only "black cow."

B. Special Provisions.

It is apparently true that the Special Provisions as stated in appellants' brief, page 19, "embody a scheme whereby the insurance contract may be continued in effect and operation after the death of the insured" and by this admission and the obvious meaning of the Special Provisions themselves it is intended to refer to a time *after* the death of the insured. In fact the very heading confirms this view. "Special Provisions relating to settlement when this policy become payable" must refer to a time after the death of the insured, because until that event the policy does not become payable.

We are, therefore, seeking the intent of the insured in including these provisions. It is apparent that paragraph 1a indicates that the insured was thinking of a time after his decease because he provides that if he himself has made no election prior to his decease then after his decease the direct beneficiary may make such an election. He states that upon the direct beneficiary making such an election the interest of the contingent beneficiaries, whom he has designated, *shall terminate.* It would hardly seem necessary to state that the interest of contingent beneficiaries at a time after his death should at such time terminate if he had intended that such interest would terminate at his death. This indicates clearly that he intended that the interest of the contingent beneficiaries, i.e., the right to take any benefits not actually paid to the direct beneficiary in person, would continue unless the wife should exercise the power, which he had granted to her,

to terminate this interest by an election. He then proceeds to give the direct beneficiary an additional power, i.e., after terminating the interest of the contingent beneficiaries by her election she may make a second election and determine whether the proceeds of the policy should go to her own estate or to persons whom she might designate to take directly from the insurance company upon her death. It is apparent that she could not exercise this second power, that is to designate other contingent beneficiaries, until she had first terminated the continuing interest of the contingent beneficiaries designated by the insured, through the procedure of an election.

It must be presumed that the wife knew her rights as set out in the policy and knew that she had the power by an election to terminate the interest of the insured's children so that the proceeds and benefits of the policy, if she did not survive long enough to collect them, would then go to her estate. Her failure to exercise this power and make such an election would give rise to the inference that, in accordance with the intent of the insured, she wished his children to take any proceeds which she herself might not receive.

The appellants in their argument on page 21 are again begging the whole question when they state that the surviving wife, upon the death of the insured, had the right to receive the proceeds "in one sum." According to the plain provisions of the policy her right upon the death of the insured was to receive such payments as were *actually made to her in her lifetime* because upon her death all unpaid benefits due or to become due would pass by succession to the contingent beneficiaries.

C. Authorities.

The case of *Chartrand v. Brace,* 16 Colo. 19, 26 Pac. 152 (1891), is referred to in appellants' brief. As is indicated by well recognized authorities, there is little value to be gained from the interpretation of documents not similar to the one in dispute. The contract referred to in the *Chartrand v. Brace* case was not similar to the present policy in the *Hill* case. None of the paragraphs indicating intent of the insured, discussed and referred to in the foregoing pages of this brief, were there included. As stated in appellants' brief, page 25, the Chartrand policy provided that the proceeds of the policy "at his death should be paid to his wife . . . and in case of her death to . . . his children." Such provision does not state that "upon the death of the wife the children shall succeed to any unpaid benefits due or to become due." The court reasoned that "in case of her death" must refer to a condition existing at the date of the death of the insured, otherwise the provision would have no meaning. The court, therefore, concluded that "in case of her death" meant if she were dead at the date of insured's death the proceeds of the policy would be paid to the children. Since she was not dead at that time naturally the proceeds in accordance with directions of the insured should be paid to her or to her estate. No provision was included in the policy under which the children could take if she died at a subsequent time.

This, however, is not the situation in the present case. Our policy states that "upon the death of the direct beneficiary the contingent beneficiaries shall succeed to the interest of such direct beneficiary" [R. 43, 44]. This is a direct provision for succession to the wife's interest

whenever she died and by its express terms gives any benefits of the policy still in the possession of the insurance company to the children.

That part of the quotation from the case set out in italics on page 24 of appellants' brief does not apply to the type of policy now before the court in the *Hill* case. Apparently the insurance company has profited by experience and court cases since the date of the *Chartrand v. Brace* case in 1891. It might be noted that the policy in the *Hill* case was dated in 1942. In drafting the present policy the company not only used a wording which avoids the construction in the *Chartrand* case but also sets up a provision which will make the possibility cited in italics impossible. If there were any suggestion that the Northwestern Mutual Life Insurance Company had followed or threatened to follow the practice there set out of improperly delaying payment (and there is no such suggestion in this case) the wife has adequate protection by exercising the election set out in paragraph 1a of the Special Provisions. She could immediately and at any time after the death of the insured, if she so desired, by an election assure herself and her estate of getting all of the proceeds no matter how long payment might be delayed. By this simple process of making an election to take under option A of the policy she could terminate the interest of the contingent beneficiaries, set the proceeds of the policy up at a fixed interest rate and having done so be entitled to take the proceeds of the insurance policy whenever she so desired during her life or leave them so that her personal representative could collect them after her death.

While the actual interpretation of a different contract in another case is of little value if cited as a specific interpretation for the contract under discussion, yet the

general rules of interpretation and construction referred to can be of definite assistance. We point out at this time that even in the *Chartrand* case with its language which indicates an interpretation leaving the proceeds to the estate of the wife, the three judges of the court at the first hearing decided unanimously in favor of the children. After rehearing two of the judges decided in favor of the estate of the wife, while the third dissented in favor of the children.

Some of the general rules of construction stated in this case are so fundamental and have had such universal acceptance that we set them forth for the guidance of the court in the present case.

> "While the certificate is to be construed as a contract, nevertheless, it being in the nature of a policy of insurance, a post mortem provision for the benefit of those dependent upon the assured for support, it is, like the provisions of a will, to be liberally construed in favor of those who may naturally be presumed to have been the objects of their father's bounty. In order to correctly understand and give effect to the contract over which this controversy has arisen, certain rules for the interpretation and construction of written instruments will be noticed. Primarily to be considered is the intention of the husband and father in effecting the insurance, and this is to be ascertained from the language of the certificate itself, construing its words according to their common and reasonable signification, so as to give effect to the entire instrument as far as practicable; secondly, the language of the instrument is to be construed in the light of extrinsic circumstances attending its execution, considering the situation and rela-

tions in life of the several parties therein mentioned, and the objects and interests to be thereby secured."

"But it is scarcely necessary to invoke cumulative authority to confirm the view that it was the father's intention, in case of his wife's death, that the insurance money should go to his doubly orphaned minor children, instead of the administrator of the deceased wife, either for the payment of her debts, or for the benefit of her heirs, who were to him as strangers, having no special claim upon his fortune, his benevolence, or the fruits of his labor."

Henry v. Thomas, 118 Ind. 27, 20 N. E. Rep. 519.

"Words might have been inserted in the certificate providing for the payment of the insurance to the children only in the contingency of the wife's death before the death of the assured. If such words had been inserted, they would necessarily have controlled the interpretation of the instrument. But such words were not inserted, and they certainly should not be supplied by implication, when, from all the facts and circumstances legitimate to be considered in construing the instrument, the obvious effect of supplying them, as contended by appellee, would be to defeat, not to effectuate, the intention of the assured."

"But the contention is that a certain 'formula of words' used in the certificate has been construed by the courts to have a certain and definite signification, and that this court should feel itself bound by such precedents. As heretofore shown, no case has been cited in which the language was 'precisely analogous' or 'strictly identical' with the certificate under consideration; nor has any case been cited where the circumstances and relation of the parties to be affected by the instrument were either precisely or substantially analogous to those under consideration. It has

been before observed, and it can scarcely be made clearer by repetition, that the courts, specially the American courts, will not allow themselves to become slaves to 'arbitrary and unbending' precedents, when the effect of such servility is to do manifest injustice. But they will rather 'grapple with the difficulties which present themselves, however formidable and embarrassing,' in each particular case, and determine the same with reference to its 'peculiar circumstances,' placing the decision 'upon the proper basis of truth and justice, without regard to the entire want of precedent.' 1 Redf. Wills, *supra.* The law is not, and in the nature of things cannot be, an exact science, like mathematics. Long ago able jurists gave up the idea of formulating specific rules adapted to the exigencies of each particular case. At the best, the law is but a rational science, founded on general principles of right and justice. Experience has shown that these principles, when intelligently and conscientiously applied, insure substantial justice in the larger proportion of litigated controversies. In mere matters of procedure, which are but the means to the end, specific rules of comparative uniformity may be formulated, and many precedents may be thereby established, though, even in this branch of the law, much must necessarily be left to sound judicial discretion. But in the great field of jurisprudence, relating to rights of persons and rights of property, arbitrary and unbending precedents have ever been found too narrow for the multitude of vexatious and complicated controversies arising from the varied transactions of an enlightened and progressive people. Precedents are valuable aids to those who can utilize them with intelligent discrimination; but to those who are dependent upon such assistants, precedents are liable to become uncertain and misleading guides."

We hesitate to quote more from this case, but, since it has been relied upon by appellants, we suggest that the whole case be read. We particularly refer to the language of the dissenting opinion of Justice Elliott. We realize that it is a minority opinion but it sets forth in able manner the rules which should guide the court in interpreting an insurance policy. Although the wording of the policy there in question led two judges to award the proceeds to the estate of the wife, we are convinced that the same rules when applied to the Hill policy will leave no doubt that the benefits should go to the surviving children. The whole of this opinion of Justice Elliott could be adopted in appellees' brief.

The case of *Kottman v. Minnesota Odd Fellows Mut. Ben Soc.*, 66 Minn. 88, 68 N. W. 732 (1896), cited on page 24 of appellants' brief was decided on facts almost identical with the *Chartrand* case and our observations are applicable to both. Again the wording of the policy called for the relating of the words "if living" to a particular date which must be either the death of the insured or a date sixty days after notice and satisfactory proof of death of the insured. The court found as a matter of logic and reason that the proper date to which this event should be related was the date of death of the insured.

In discussing the matter of the law favoring vesting in preference to contingent assets or interests it will be observed that the court in that case was referring to a contingency and uncertainty which would exist if the date selected were the subsequent date sixty days after filing of proof. Under the policy there in discussion determina-

tion of the beneficiary had to be made at a specific time and if the later date were selected there would be an intervening period of at least sixty days in which the uncertainty would continue. The law favored removing this uncertainty by selecting the date of death of the insured. We submit that in the policy under consideration in the present *Hill* case no such uncertainty existed. There was no uncertainty existing because upon the death of the insured the wife (the direct beneficiary) *and* the children (the contingent beneficiaries) were immediately determinable as beneficiaries. In other words, the ones to take the proceeds were immediately named and determined by the policy and no possibility existed that other than these might be entitled to an interest. The only question to be determined by the passage of time was whether the wife would survive long enough to collect all of the benefits. This situation is very similar to that of a grant to a life tenant and remainderman. When both are fixed and determined by the grant both the life tenant and the remainderman take a "vested" interest. The mere uncertainty as to the duration of the interest of the life tenant or the beginning of the interest of the remainderman does not prevent the interest of both "beneficiaries" becoming vested.

The next case referred to in appellants' brief, on page 26, is that of *Northwestern Mutual Life Insurance Company v. Fink,* cited *supra.* A full discussion of this case, which we consider of great importance, will be found near the end of this brief.

Answer to Point II. of Appellants' Brief.

The appellants on page 29 of their brief attack the reasoning of the trial court in arriving at the intent of the insured from the surrounding circumstances as well as the policy itself. These surrounding circumstances are directly in evidence and quoted and referred to by the appellants in their opening brief in the statement of the case on page 2. These surrounding circumstances as set forth in such brief and in the record [R. 36B, 39, 55 *et seq.*] are as follows:

1. When the policy was first taken out on December 2nd, 1942, the proceeds were payable to Mr. Hill's (the insured) three children as direct beneficiaries.

2. When the insured revoked such designation on January 26, 1944, and named his wife the direct beneficiary he did on the same date by separate instrument again include his three children in the policy by naming them contingent beneficiaries in accordance with the rights given them in the policy.

3. The contingent beneficiaries now claiming under the policy are the *children of the insured.*

From these facts shown in the record and the wording of the policy itself the court is called upon to determine the actual intent of the insured when a contest arises between his own children as claimants and the estate of his deceased wife through which the proceeds of his policy might go to either creditors of the wife or legatees or heirs of the wife not known to the insured. These facts as the circumstances surrounding the policy have a bearing on the court's determination. As quoted by appellants in their reference to the *Chartrand* case on page 23 of their brief: "A policy of life insurance is in the nature of a

testament, and, although not a testament, in construing it the courts will so far as possible treat it as a will."

In the interpretation of a will and similarly in the policy of life insurance the court should give due consideration to the natural propensity of a testator or of an insured to provide for his own children, his own heirs and the natural recipients of his bounty and where any doubt exists resolve such doubt in favor of such a natural intent. See *Chartrand v. Brace, supra.*

We, therefore, submit that the Judge of the District Court not only was entitled to consider these facts in determining the actual intent of the insured but he was legally bound to do so and did in fact properly consider them in determining the actual intent of the insured.

Analysis of the Fink Case.

As stated above we consider the *Fink* case (*Northwestern Mutual Life Insurance Company v. Fink,* 118 F. (2d) 761 (C. C. A. 6, 1941) referred to on page 26 of appellants' brief to be highly important. We differ with appellants' interpretation of that case and direct the court's particular attention to it.

Examining the policy in that case which was under consideration we find that it is also a Northwestern Mutual Life Insurance Company policy, and that it has almost the same wording as the policy in our *Hill* case. Paragraph 11 of the General Provisions as quoted in the decision is, with an unimportant variation, identical with sentences (A), (B) and (C) of the Hill policy as these sentences are set out on page 14 of appellants' brief. Paragraph 4 of the Special Provisions in the *Fink* case is almost identical in language with paragraph 5 of the Special Provisions in the *Hill* case [R. 26].

The facts in the Fink case are almost identical with the facts in the *Hill* case. In the *Fink* case the court states the facts as follows "Edwin A. Wolf married twice. He had two children, Virginia C. Wolf and Edwin Wolf, Jr., by his first wife. His first wife died and he married Charlotte S. Wolf. She had two children, Janet and Maurice Harrison, by a previous marriage. The policy was issued October 17th, 1938, and, it, with the application, constitutes the entire contract." Mr. Wolf, the insured, died and his wife survived. Following that and before proceeds of the policy were paid the wife died. The court was called upon to determine whether the proceeds of the policy should be paid to the estate of the deceased wife (direct beneficiary) or to the children of the insured (contingent beneficiaries). These facts are almost identical with the facts in the *Hill* case.

In the designation of direct and contingent beneficiaries in the *Fink* case the insured used the following language: "I, Edwin A. Wolf, the insured . . . hereby designate Charlotte Wolf and Florence W. Gage, wife and sister, as direct beneficiaries under said policy, share and share alike. In the event of the death of Charlotte Wolf such share as she would have been entitled to receive shall be payable to Virginia C. Wolf and Edwin Wolf, Jr., share and share alike, or to the survivor of them." There is some variation here from the *Hill* case but we consider it of slight importance. In accordance with his rights under paragraph 11 of the General Provisions the insured named two direct beneficiaries, his wife and sister, while in the *Hill* case only the wife was named as direct beneficiary. In both cases the children of the insured were made contingent beneficiaries of the wife's interest as direct beneficiary. In both cases the policy provided that if there

were more than one direct beneficiary the interest of any deceased beneficiary including any unpaid benefits due or to become due would pass to the surviving *direct* beneficiary. In the *Fink* case this would have meant that the wife's interest upon her decease would pass to the insured's sister. To pass this interest to the insured's children an addition to the designation was necessary and the insured provided that "in the event of the death of Charlotte Wolf such share as she would have been entitled to receive shall be payable to" insured's children. The effect of this, therefore, was to make the wife the direct beneficiary as to one half of the benefits and the insured's children contingent beneficiaries as to that half.

Appellants seek to point out some distinction of this wording designating direct and contingent beneficiaries in the *Fink* case and the wording setting up direct and contingent beneficiaries in the *Hill* case. This distinction we cannot see. In the *Hill* case there was no need for the insured to repeat the provisions setting forth the rights of the direct and contingent beneficiaries as these were all set out in detail in paragraph 11 of the General Provisions. By designating his wife direct beneficiary Mr. Hill in effect used the following language in such designation: (Sentence (C) of paragraph 11) Upon the death of my wife my children shall succeed to the interest of my wife, including any unpaid benefits due or to become due.

In the *Fink* case the insured accomplished the same purpose in effect as follows: In the event of the death of my wife such share as she would have been entitled to receive shall be payable to my children.

The court in the *Fink* case interpreted the language of the designation to simply designate the wife the direct beneficiary and the children the contingent beneficiaries

stating as follows (page 763): "Charlotte Wolf was, of course, a direct beneficiary," and again, "The insured was fully authorized under paragraph 2 of Clause 11 above quoted to designate the Wolf children as contingent beneficiaries and to fix their interest. He did this in simple language easily understood."

In arriving at the conclusion that the children of the insured and not the estate of the deceased wife should take the proceeds the court made this helpful statement of the law:

> "We must keep in mind at least two general rules applicable to life insurance policies as well as to all other contracts. First, the policy must be read as a whole; and second, effect must be given to the plain, ordinary and popular meaning of the language used."

In answer to the argument about the proceeds becoming "vested" upon the death of the insured in the surviving wife so that her estate would be entitled to the proceeds as against the children of the insured, which is the exact contention now being advanced by appellants in the *Hill* case, the court made the following significant statement: "To adopt appellees' (estate of the deceased wife) insistence that Charlotte Wolf became vested with the right, title and ownership of one-half of the proceeds of the policy upon the death of the insured would be to rewrite the designation of beneficiaries. We would in effect, after the name, Charlotte Wolf, in the last sentence, insert the words 'before the death of the insured,' but the insured made no such limitation. The change would constitute a material alteration which we are not authorized to make."

In passing upon the contention made in the *Fink* case and now advanced by the appellant in the *Hill* case, that

the trial court had no right to consider "surrounding circumstances" the court made this significant statement: "We are not called upon to search for the insured's intention. It is clearly expressed over his own signature. If it were necessary to look for the reason for his action it could probably be found in the natural instinct to protect, first, his widow during her lifetime, and second, his own rather than his step-children . . ."

In its decision the Circuit Court of Appeals reversed the decision of the District Court which had awarded the proceeds of the policy to the estate of the deceased wife and ordered the proceeds paid to the children of the insured (the contingent beneficiaries).

The appellants in the *Hill* case at the bottom of page 28 of their brief state that another reason for the decision in the *Fink* case was that the wife had died prior to filing proof of the insured's death. We point out that this is not a reason for the court's decision, nor is it a valid legal distinction although the facts in the *Fink* and *Hill* cases differ at this point. The court in the *Fink* case after commenting that the wife had died before execution and receipt of proof of his death proceeded to state, "But, this to one side, her right to receive any unpaid share of the proceeds of the policy terminated with her death." Appellants have advanced no argument, and in our opinion they could advance none, to show that the wife's rights were any different after receipt of proof of death by the company than they were before, except the routine matter of collecting the proceeds. The whole argument of appellants in their brief would fall if they adopted this view because their contention is that the rights of the wife vested upon the death of the insured. We will not discuss this point further since it is not an issue in this appeal.

Conclusion.

We submit the issue to this court. Not only does all sound reasoning based upon plain, ordinary and popular meaning of the language used in the Hill policy, indicate that Mr. Hill intended his own children to take any proceeds of the policy not paid to his wife during her lifetime but also the authority of the Sixth Circuit Court of Appeals expressed on April 8th, 1941, in the *Fink* case, and not reversed or excepted to by any court since that time on a set of facts and issues almost identical with those now before this court, confirmed these conclusions and established a precedent which should have the due respect of this court.

It is respectfully submitted that the judgment of the District Court should be sustained and the appeal dismissed.

Respectfully submitted,

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